



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

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**DECISION OF THE BOARD**

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Mailed and Filed: MAY 08, 2023

IN THE MATTER OF:

Appeal Board No. 628671

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective November 4, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to November 4, 2022 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed March 17, 2023 (), the Administrative Law Judge sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant worked for an automotive restoration business as a full-time mechanic, for 11 years until November 4, 2022. In October 2021, the claimant received a written warning document due to his unsatisfactory work performance. The document stated, among other things, that the claimant must "clock in by 10:00 am every day. Not 1 minute after." The document also stated, "If not coming in at all, must call that morning." The document did not state that he was being warned for unsatisfactory attendance. The claimant was not told that his job was in jeopardy due to unsatisfactory attendance.

On October 24 and 28, 2022, the claimant was scheduled to work. He was absent from work on both days, because his son, who he had not seen in thirteen years, came in from Florida with the claimant's grandchildren to visit him and the claimant wanted to spend time with them. He notified the employer's president of his absences. The employer was aware that his son was visiting him. On November 4, 2022, the employer discharged the claimant because he was absent from work on October 24 and October 28.

OPINION: The credible evidence establishes that the employer discharged the claimant because he was absent from work on October 24 and October 28, 2022. We are not persuaded by the president's contention that he had told the claimant that this job was in jeopardy due to absenteeism. In assessing credibility, we note that the written warning document was about his poor work performance and about clocking in at 10:00 am. The document did not advise him that he would be fired for continuing unexcused absences and only required him to notify the employer of absences. The claimant complied with this requirement. We therefore credit the claimant's testimony that he was not told that his job was in jeopardy due to unsatisfactory attendance. Further, the president admitted he was aware that the claimant's son was visiting the claimant. As the claimant was not aware that his absences could result in discharge, we conclude that the claimant did not lose his employment due to misconduct.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determination, disqualifying the claimant from receiving benefits, effective November 4, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to November 4, 2022 cannot be used toward the establishment of a claim for benefits, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER